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Real Estate - Portugal

Real estate financing and security

Contributed by **Morais Leitão, Galvão Teles, Soares da Silva & Associados**

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Author

Rita Ferreira Vicente

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Financing and security

A facility agreement secured by a mortgage is the most common financing and security method for real estate projects in Portugal.

There are no specific restrictions on the maturity of a financing agreement, but the maturity date should be determined.

Loan to value, interest cover and debt service cover ratio are terms customarily agreed on to set a tighter framework for the credit facility.

Security package
As a general rule, no governmental or other consents are required for the provision of security. Under Portuguese law, the concept of a floating or general charge on a company's assets is not recognised. However, certain assets (eg, assets in the public domain or linked to public services) cannot be pledged. This will depend on a specific analysis of the assets in question.

Mortgage of property
Real estate mortgages must be executed before a public notary or an equivalent official and registered with the Property Registry Office. Registration is a condition of the mortgage's validity. If agreed between the parties, the mortgagee can become a beneficiary of the proceeds from the insurance agreement entered into to cover the risks of the mortgaged property.

Assignment of revenues
The assignment of revenues secures the fulfilment of an obligation to the creditor, which is entitled to be paid from the revenues of a real estate asset. Granting this security requires a deed that must be registered with the Land Registry Office and cannot exceed 15 years.

Pledge of shares
The pledge of nominative shares must be recorded in the company's books and certificates, or in the relevant security account if they are book entry shares. The pledge of shares must be registered at the Commercial Registry Office. A company's bylaws may require the consent of shareholders to grant the pledge. Without prejudice to the above, all pledges will take effect against a company once it has been informed in writing or has given its express or tacit recognition thereof.

Book debt, receivables and insurance
A pledge or an assignment by way of security can be granted over receivables, which must be notified to the debtor. An assignment by way of security can be granted over future receivables, as long as they are determinable. Portuguese law allows assignments by way of security of rents that arise from real estate leases.

Interest and withholding tax on interest payments

Pursuant to Portuguese law, interest payments are calculated daily, using an interest rate for the relevant period, with the end result rounded up or down to the nearest one thousandth of a percentage point on sums outstanding at any time under the financing. Interest is calculated with reference to a 360-day year.

Late payment interest is limited to a maximum of 3%, to be accrued to the interest rate.

As a general principle, interest payments to non-resident companies or credit institutions are subject to a withholding tax of 25%.

Under the tax treaties in force, reduced rates may apply when domestic rates are higher than the treaty rate. The reduced rates range between 10% and 20%, according to the applicable double tax treaty.

No withholding tax is due on interest payments to Portuguese resident credit institutions (or Portuguese branches of non-resident credit institutions) and specific exemptions also apply under parent-subsidiary rules.

Stamp duty issues

Territorial application
Stamp duties are levied in accordance with the Stamp Duty Code and the General Stamp Duty Table – at percentage or lump-sum rates – on all acts, deeds, documents, securities, books, papers and other events listed in the table that take place in Portugal and are not subject to value added tax.

Nonetheless, the Stamp Duty Code foresees rules that extend its application to a series of events executed or performed outside Portugal. Notably, stamp duty is charged on loans granted, guarantees made, interest charged and commissions levied by non-resident credit institutions, financial institutions or other companies to Portuguese resident entities, irrespective of their nature.

Rates
Stamp duty applies to loans, guarantees, interest and commissions at the rates described below:

- Loans granted to a Portuguese borrower will incur stamp duty at a rate of:
  - 0.04% per month if the term for repayment is less than one year;
  - 0.5% on each disbursement if the term for repayment is equal to or greater than one year, but less than five years; or
  - 0.6% on each disbursement if the term for repayment is five years or more, all cases being calculated on the amount of the loan.
- Stamp duty is charged on security unless ancillary to a contract that is already subject to stamp duty (ie, as long as security is granted at the same time as a Portuguese loan that is subject to stamp duty is executed and the guarantee secures that loan). This means that if security is granted at the same time as a Portuguese loan to a Portuguese borrower, stamp duty need be paid once only.
- When applicable to security, stamp duty rates are the same as those set out above for loans and are calculated based on the amount secured. When the security is intended to cover all loans, the issue of security by a Portuguese guarantor will entail payment of stamp duty for the full amount secured. It is possible to fix contractually the amounts secured by the security, thereby limiting the applicable stamp duty payable.
- If no loan is granted to a Portuguese entity, the agreement is signed outside Portugal and the Portuguese entity acts as guarantor. No stamp tax is due on this security. However, stamp tax (at the above rates) must be paid if the agreement is subsequently presented in Portugal before an official entity (as would typically be the case in an enforcement scenario).
- Interest, banking commissions and fees for financial services paid by a Portuguese borrower will also be subject to stamp duty at a rate of 4%.

Enforcement

A mortgagee does not have the right to take possession of a property in the event of default in payment of the secured obligation; rather, it has the right only to a judicial sale of the property and to payment from the proceeds of that sale. In a judicial sale, the property will be sold free of any charges and encumbrances.

In relation to mortgages, the normal procedure is enforcement of the security by means of seizure (ie, judicial seizure of the asset is given as a guarantee of the obligation).

Seizure grants the creditor the right to payment from the proceeds of the sale of such assets in preference over other creditors, provided that there is no prior security *in rem* regarding the assets in question.

Under Article 735(3) of the Civil Code, real estate privileges are always special.

Regarding real estate properties, the hierarchy of claims – taking into consideration creditor privileges – is roughly as follows:

- claims of employees working in the mortgaged property;
- claims from judicial expenses incurred directly on the common interest of the creditors for the preservation, execution or liquidation of the real estate properties;
- state claims for tax on property transfer, heritage and donations;
- local public authority claims for municipal tax on real estate properties;
- social security claims;
- any claims secured by retention rights; and
- claims secured by mortgage, in compliance with the priority arising from the respective registry.

The enforcement procedure involves the following steps:

- filing a petition in a competent court;
- the secured creditor's seizure of the debtor's assets, which is effected by electronic communication to a competent Land Registry Office (the equivalent of a formal registration application), with the assets delivered to a custodian – normally, an enforcement agent;
- the service of proceedings on the debtor;
- the service of proceedings on the debtor's creditors that have priority claims in respect of its assets;
- a court order that establishes the order in which the creditors are to be paid, assuming that there are several creditors;
- the sale, by way of court order, of the secured assets; and
- the distribution of the proceeds of the sale in accordance with the order of priority determined by the court.

The length of the security enforcement process varies. Based on existing evidence, it is estimated that enforcement proceedings in relation to mortgages take on average between one and three years without appeal.

For further information on this topic please contact Rita Ferreira Vicente at Morais Leitão Galvão Teles Soares da Silva & Associados by telephone (+351 22 616 69 50) or email (rfvicente@mlgts.pt). The Morais Leitão Galvão Teles Soares da Silva & Associados website can be accessed at www.mlgts.pt.